

January 31, 2019

Re: Possible Waste, Fraud or Abuse in EPA Region V: Suppression of Comments on the Poly Met Mining Company State Water Permit and other Permit Actions by Minnesota, and the Region Making Comments Off the Record in a Way that Hides Them From the Public

From: Jeffry Fowley, individual complainant (retired EPA attorney)

To: Kathlene Butler, EPA Office of Inspector General

I have received information from various sources regarding possible waste, fraud or abuse in EPA Region V. Based on the information I have received, the following appears to be the case. First, it appears that the Region has failed to meet its basic oversight responsibilities regarding a water permit that the state of Minnesota recently issued to the Poly Met mining company in the state's federally authorized NPDES program. As further explained below, the state appears to have developed a permit that does not meet minimum federal requirements. Yet, I have been advised that planned EPA staff written comments on the permit were suppressed by the Region V Regional Administrator Cathy Stepp. As also explained below, the failure to provide such comment violates legal and ethical requirements (assuming that this occurred). In addition, while significant EPA concerns about the permit reportedly were instead communicated to the State by telephone, I also have been advised that the Region cooperated with the State in helping to keep such comments off the state record, in ways that seem designed to hide the concerns from the public and even from the Minnesota state appeals court that is expected to review the permit. This procedure of EPA making comments off the record is highly unusual, and I believe it to be unethical (assuming that this occurred). Finally, I have been advised that misconduct of the kind that occurred regarding the Poly Met permit is continuing within EPA Region V and is likely to continue under the current Regional Administrator. In particular, the Region and State have reportedly engaged in conversations about ways to continue to have EPA make comments on future permits off the record, such as sending EPA comments to the state only by screen shot. The Regional Administrator also reportedly has suppressed staff comments regarding other Minnesota permit actions as well.

Because the information I have received suggests that the Regional Administrator and perhaps others have acted unethically, I am reporting this matter to your office. I am reporting this matter directly to you since I understand you are doing the investigation of the decline in EPA enforcement, and what appears to have occurred here regarding permits raises similar issues of EPA not carrying out its basic responsibilities including not doing effective state oversight.

I have no particular position one way or the other regarding the Poly Met mining project. I am simply acting as a citizen to bring to your attention improper conduct within EPA Region V that appears to have occurred. Whether or not the project should move forward, all should agree that the review of the water permit should have been handled in an ethical manner, including having both the EPA and state follow proper and transparent procedures.

I acknowledge that the information I have received is second-hand – I am not myself a witness to any misconduct. But the information seems credible and I have been able to confirm many of

the key matters through discussions with multiple sources. In any event, I believe there is enough here to justify an investigation. I hope that you will investigate this matter and determine whether improper conduct has indeed occurred. I would be happy to cooperate with any investigation, including providing you with further information, including regarding my sources of information.

I. Poly Met Permit Issues

The recently issued state water permit to the Poly Met company is for a major new mining project which will discharge mercury and other toxic pollutants into waterways which will flow downstream into tribal waters and the Great Lakes. Because this was a particularly significant permit, it was reviewed by Region V staff pursuant to the review authority provided by section 402(d) of the Clean Water Act, and the Memorandum of Agreement between EPA Region V and the Minnesota Pollution Control Agency. This review also was required by a regulation, as discussed below.

Suppression of EPA Staff Comments

I have been advised that the public noticed draft of the proposed permit and supporting materials sent to EPA by the State in early 2018 did not adequately analyze whether the mine's discharges had the potential to violate water quality standards and thus did not contain the kind of strict water quality permit limits that are required by federal law. Accordingly, the staff in Region V reportedly developed written comments to be sent to the State advising them that an adequate "reasonable potential" analysis needed to be done – and that any water quality based permit limits then shown to be necessary then needed to be developed.

Under the federal Clean Water Act, it is not sufficient for permits to contain only technology based limits based on what companies' treatment systems generally are capable of meeting. Rather, pursuant to section 301(b)(1)(C) of the Act, any permit also must contain "any more stringent limitation ... necessary to meet water quality standards." Water quality based permit limits typically are needed when there are planned significant discharges into waterways with limited flow such as the creeks and wetlands into which the Poly Met company plans to discharge. The EPA regulations specify that any permit issuer must examine whether any pollutants planned to be discharged have the "reasonable potential" to cause water quality violations, and then must include water quality based permit limits for each pollutant for which there is such a reasonable potential. 40 C.F.R. § 122.44.

The Region V staff comments reportedly raised serious issues about whether the State was complying with these basic federal requirements. However, after she reportedly was called by the State Commissioner, John Linc Stine, who reportedly complained about the planned comments, I have been told that the EPA Regional Administrator for Region V, Cathy Stepp, directed in March, 2018, that the EPA staff not send any written comments to the State. That no comments would be sent at that time was confirmed in various emails, including one from Ms. Stepp's chief of staff, that I have obtained and can provide.

As set out in the emails, in return for the EPA not commenting at that time, the State agreed that the EPA could have 45 days to comment on the planned future draft of the permit (to be developed after the public comment period), prior to the issuance of the final permit. However, when the State later sent this final draft of the permit for potential EPA review, in the fall 2018, the EPA again did not send any written comments to the state. It seems likely that this continuing failure to comment again was done at the direction of Ms. Stepp.

Comments should have been issued by the Region in the fall 2018 since the permit reportedly still was defective. The final permit issued by the State in December 2018 contains some improvements from the earlier draft, but reportedly still does not adequately address the concerns that were sought to be raised by the Region V staff. In particular, it appears that the final permit still is not backed by an adequate reasonable potential analysis done in accordance with the federal standards and still does not contain any permit limits specifically developed to fully protect water quality. My own examination of the permit and fact sheet¹ has confirmed that the state's supposed reasonable potential analysis does not contain the kind of mathematical calculations needed to fully determine whether water quality standards potentially could be violated. Moreover instead of developing strict discharge limits, the permit relies in part on so-called operating limits to help prevent reasonable potential, which are limits on internal flows "voluntarily" agreed to by the company, which do not necessarily ensure the protection of water quality and, in any event, might not be federally enforceable.

Thus by giving in to state pressure and preventing EPA comments from being sent, it appears that Ms. Stepp allowed a permit to be issued that does not meet the usual standards required by federal law. Moreover, even if the final permits is viewed as somehow being adequate, this does not justify the suppression of the EPA staff comments. Review of at least a few key state permits is a basic EPA responsibility and the EPA staff should have been allowed to do their jobs. Having the EPA comment, with the State then having to respond to the comments, might have removed any doubts about the adequacy of the permit.

While EPA generally has discretion regarding which state water permits it reviews, this was not the case here. Pursuant to 40 C.F.R. § 123.24(d)(2), EPA must review all state water permits where the discharges "may affect the waters of a State other than the one in which the discharge originates." The Fond du lac tribal reservation is downstream close to the planned discharge locations, and the tribe has the status of a state for Clean Water Act purposes. Clearly the tribe's waters will be affected by the discharge. Thus EPA Region V was required to review this permit. Reviewing a permit implicitly includes submitting comments – to say otherwise would put form over substance. Thus assuming that the reports I have received are accurate, the EPA Regional Administrator violated the regulation by suppressing the comments. Moreover, once this permit was reviewed and significant violations of federal requirements were identified, the comments should not have been suppressed whether or not a permit review was initially legally required. It is unethical to suppress the results of a permit review which has found serious violations of law.

¹ I am a former EPA attorney who worked for thirteen years in the water program, and who now is retired.

The Trump Administration recently has moved to disinvest from some permit reviews – as indicated by an Oct. 30, 2018 memorandum from Administrator Wheeler. However, the Office of Inspector General need not get involved in whether there are problems with the Wheeler memorandum, in order to determine whether there has been misconduct in Region V. Ms. Stepp's reported conduct in blocking any written comments falls below even the low bar set by the Wheeler memorandum, which says that the EPA will continue to engage in matter specific consultations with the states to address urgent precedential or high profile matters, to execute EPA obligations established by statute or memorandum of understanding, and to respond to significant violations of federal law. Blocking comments on the high profile Poly Met matter, which were developed pursuant to EPA obligations established by statute, regulation and a memorandum of understanding, and which laid out how the then planned state permit would violate federal law, is contrary to the policies set forth even in the Wheeler memorandum.

Making off the Record Comments Which can be Hidden From the Public and Courts

I have been advised that, in place of sending any written comments, the general nature of the EPA staff concerns about the state permit was related to state personnel by telephone, during the public comment period (ending in March 2018). I further have been advised that state personnel then agreed to have EPA staff read key parts of their written comments to the state personnel over the telephone. This reading reportedly occurred in April 2018, just after the close of the public comment process. The State's apparent purpose in adopting this procedure was to get the benefit of the EPA's comments without having any written comments in the official state record.

By communicating comments only by telephone, having reason to know that state personnel likely intended to not make an official record of the comments, the EPA personnel contributed to there being a non-transparent state process (assuming that the reports I have received are accurate). As noted below, this has enabled state officials to cover up that there were significant EPA concerns about the permit. EPA comments should not be communicated to states in a manner that can be hidden from the public and even from reviewing courts. While Regional Administrator Stepp may not have ordered – or even affirmatively authorized – this procedure, I believe that she is ultimately responsible for the situation (assuming that the reports I have received are accurate). By reportedly preventing EPA staff comments from being forwarded to the State in the normal open and ethical manner, she created a situation where the staff may have felt that this non-transparent procedure needed to be used.

In the response to comments document issued along with the final permit by the State, there is no mention of the State ever having received any EPA comments and no response to the EPA comments that reportedly were received over the phone (either during the comment period or after). The public statement on the permit issued by the State (posted on its website), emphasizes that its permit underwent federal as well as state agency review, without mentioning that there were EPA written comments critical of the permit which the State Commissioner reportedly successfully lobbied to not be sent. The state's press release on the permit similarly states that there were no EPA comments received during the (45 day) period in the fall 2018 allotted for them, without mentioning that there were comments reportedly earlier read to state personnel over the phone.

This is all highly misleading, assuming that the reports I have received are accurate. This is particularly disturbing because a public interest group is challenging the new permit and the state appeals court will rely on the administrative record of permit proceedings when reviewing the case. As a result of Ms. Stepp's reported actions, I am concerned that any EPA critique of the draft permit may be kept out of that record required to be filed with the court.

There is a federal requirement that when issuing permits, States like Minnesota authorized to carry out federal programs must respond on the record to all significant comments filed during a permit's public comment period. 40 C.F.R. §124.17. By not responding to the EPA's initial general statements of concern, given to the state during the comment period over the telephone, and by not responding to the written EPA comments read to state personnel shortly after the comment period, and possibly making no official record of those comments, the State appears to have violated the spirit if not the letter of that provision (assuming that the reports I have received are accurate). Yet Region V has made no effort to stop the State from engaging in such practices.

Instead, rather than intervening to correct the record, the Region has remained silent. In particular, while I have been advised that the EPA staff kept records on its end of the comments read to the state personnel in April, the EPA has thus far failed to provide a copy of those records to a local environmental group in response to a FOIA request. Thus to date, the EPA has been cooperating with the State in covering up what actually happened (assuming that the reports I have received are accurate). There appears to be no legitimate basis for the EPA not to have granted the pending FOIA request.

Failing to Protect Tribal Waters

The EPA also has avoided engaging with the Fond du lac Native American tribe, whose tribal waters are downstream from and will be affected by the proposed mine's discharges. In addition to the EPA's failure to protect tribal waters by reviewing the state water permit, discussed above, EPA Region V is apparently planning not to protect tribal interests in connection with a different (wetlands permit) planned to be issued for the Poly Met mining project by the U.S. Army Corps of Engineers.

The tribe has asked for the EPA to play the role envisioned by subsection 401(a)(2) of the Clean Water Act regarding the wetlands permit. This mining permit was certified by the State under section 401 of the Clean Water Act in December (2018). Under subsection 401(a)(2) of the Act, since the planned discharges (filling of wetlands) "may affect" nearby tribal waters, the EPA was required to formally notify the tribe of the proposed permit within 30 days of the section 401 certification. This starts a process under which, if the tribe then notifies the EPA that the planned discharges will in its view result in violations of the tribe's water quality standards, the EPA then must review the matter and submit comments evaluating the tribe's objections.²

² The tribe has the status of a State pursuant to the Clean Water Act section 518 and thus has the same rights as any other downstream state pursuant to subsection 401(a)(2).

The deadline has passed but EPA has not yet given the tribe the required notice. Also, according to tribal officials, various EPA personnel have indicated that the current EPA administration is unlikely to comply with the law and engage in the required process on behalf of the tribe. There is no legal basis for the EPA not complying. The 401(a)(2) process gives the tribe the right to obtain an EPA evaluation of its concerns. The EPA may not defer the issues to the Corps – the whole purpose of subsection 401(a)(2) is to enable downstream states (including tribes with the status of a state) to receive support directly from the EPA. The 401(a)(2) process also is not duplicative of other permit processes. While the EPA did comment on the Corps permit – during the Obama Administration - these general comments are no substitute for the EPA having to address the tribe's specific concerns. That the tribe also had a chance to comment to the Corps also is not a substitute for its right to involve the EPA in the process. It would seem particularly disingenuous for the Region to claim duplication of effort when to date it has generally failed to address the issues raised by the mining project, including suppressing the written comments developed by its staff on the state water permit.

II. Other Permit Matters

The kind of misconduct that appears to have occurred with respect to the Poly Met permit apparently is not limited to that permit. I have been advised that there have been discussions between the State and EPA Region V about generally finding ways to avoid EPA sending written comments on permits. This could involve continuing to exchange information only in ways that can be hidden from the public and from reviewing courts. For example, I have been advised that state personnel have suggested that the EPA provide any comments on permits to them by screen shots (which presumably would not be downloaded by the state). I am concerned that unless this trend is promptly stopped (by an Inspector General Office investigation or other appropriate actions), the making of off the record comments could become a general trend under the current Regional Administrator in Region V (assuming that the reports I have received are accurate). This reported unethical conduct is likely to spread if not stopped.

Also, Regional Administrator Stepp reportedly has prevented regional staff from sending comments regarding other Minnesota permit actions as well. For example, the Minnesota Pollution Control Agency recently determined that no water permit is needed for a United Taconite mine to dump water from a mining pit into a river. This is clearly contrary to federal law which requires discharges from (dirty) non-jurisdictional waters like a mining pit into (previously cleaner) jurisdictional waters to be subject to a permit which would limit the pollution. Notwithstanding this, Ms. Stepp reportedly has directed that no EPA comments may be sent to the State regarding this matter.

I hope that the Inspector General's Office will examine the general pattern of conduct on permit reviews under the current Region V Regional Administrator, in addition to the particular conduct in connection with the Poly Met matter.

Please feel free to contact me if you need any further information. I may be reached at jfowley@verizon.net and tel: 339-440-3855.